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HAROLD B. WILLEY, Cle

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 369

LEO J. MEYBERG COMPANY, a corporation,
Petitioner,

vs.

EUREKA WILLIAMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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State of California,
City and County of San Francisco.—ss.

H. W. Glensor, being first duly sworn, deposes and says: That he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, he believes it to be true.

H. W. GLENSOR,
Attorney for Petitioner.

Subscribed and sworn to before me this 27th day of September, 1954.

(Seal) J. W. CONWAY,
Notary Public in and for the City and County of San Francisco, State of California.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

LEO J. MEYBERG COMPANY, a corporation, *Appellant,* vs. EUREKA WILLIAMS CORPORATION, *Appellee.*	No. 13,877 Jul. 30, 1954

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: MATHEWS, HEALY and BONE, Circuit Judges

PER CURIAM.

The complaint herein alleges a violation of §3 of the Clayton Act (15 U.S.C.A. §14) by reason of the refusal of appellee to continue business relations with appellant unless appellant would agree to deal exclusively in the product of appellee. That section of the Clayton Act makes it unlawful to enter into any lease, sale, or contract conditioned upon the lessee or purchaser not dealing in the goods of a competitor, where the effect of such lease, sale or contract may be to substantially lessen competition or create monopoly.

CITATIONS

Cases

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Statutes

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In the Supreme Court
OF THE
United States

October Term, 1954

No. 369

Leo J. Meyberg Company, a corporation,
Petitioner,

vs.

Eureka Williams Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions of the District Court (R. 7, 25-26) are not officially reported. The opinion of the Court of Appeals (appendix to the petition, pp. i-ii) is reported in 215 F.2d 100.

STATUTE INVOLVED.

Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. 14):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

STATEMENT OF THE CASE.

Petitioner filed an amended complaint (R. 7-23) which was dismissed by the district court upon the ground that it failed to state a claim upon which relief could be granted (R. 24-26). A prior complaint (R. 3-5) had been dismissed on the same ground (R. 6). Petitioner appealed, and the court of appeals affirmed the dismissal (Appendix to petition, i-ii).

The record consists of the two complaints and the exhibits attached thereto, the motions to dismiss and the judgments and opinions of the courts below. The facts alleged in the amended complaint show the following:

In 1944 respondent, who manufactures vacuum cleaners at its plant in Bloomington, Illinois, under the trade name "Eureka," and petitioner, who was engaged in buying and selling merchandise including vacuum cleaners, entered into a "distributor sales agreement" (R. 10-21). This agreement granted petitioner an exclusive franchise to purchase Eureka cleaners for resale in the State of California, twelve counties in Nevada and one county in Arizona. Respondent agreed that it would not grant to any other person the franchise of selling Eureka products in this territory as long as the agreement was in force (R. 12).

Paragraph 9 of the agreement provided that either party could terminate the agreement at any time with or without cause (R. 13-14).

At some time prior to July, 1952, petitioner began selling Hoover vacuum cleaners. Petitioner's sales of Eureka cleaners thereupon declined and respondent concluded that this decline in sales was caused by the fact that petitioner's salesmen who were supposed to be selling Eureka cleaners were selling Hoover cleaners (R. 22). Respondent notified petitioner on July 25, 1952, that if petitioner desired to continue selling Hoover cleaners respondent would have to make arrangements to find a new distributor for Eureka cleaners (R. 23). The complaint further alleges that respondent subsequently cancelled

the agreement and refused to sell any more cleaners to petitioner (R. 10).

ARGUMENT.

I

THE DECISION BELOW IS CORRECT.

The Court of Appeals pointed out that on these facts section 3 of the Clayton Act could have no possible application.

> "The contract (of 1944) previously existing between the parties was, by its terms, terminable at will, and contained no provision violative of §3 of the Clayton Act. In July, 1952, appellee terminated the contract by telegram for the reason heretofore stated, because appellant was continuing to deal in the product of a competitor of appellee.
>
> Prior to July, 1952, the contract between the parties did not forbid appellant to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said §3 by entering into an illegal lease, sale or contract" (Appendix to petition, p. ii).

This decision clearly is correct.

Section 3 of the Clayton Act makes unlawful a sale or contract for sale of goods on the condition, agreement or understanding that the purchaser shall not deal in the products of the seller's competitors. The section does not make unlawful a unilateral refusal by a manufacturer to sell to a distributor for any reason or for no reason at

all. The amended complaint alleges no sale or contract for sale upon any condition, agreement or understanding which precluded petitioner from dealing in the products of respondent's competitors. In fact it dealt in such products. No violation of section 3, therefore, is alleged. As the Court of Appeals for the Fifth Circuit said in affirming the dismissal of a complaint alleging that the termination of a distributorship agreement by a manufacturer because a retailer sold goods of the manufacturer's competitor violated section 3 of the Clayton Act:

> "Section 3 of the Clayton Act, by its express terms, covers only leases, sales, or contracts actually made on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller. There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself. U. S. v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992; U. S. v. Schrader's Son, Inc., 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471; Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 41 S.Ct. 451, 65 L.Ed. 892; Arthur v. Kraft-Phenix Cheese Corporation, supra. For that matter, a review of all of the cases decided by the Supreme Court involving Section 3 of the Clayton Act, reveals that in each of them there was an agreement and not a mere refusal to deal. There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another. The plaintiff has not been injured as the result of a contract, either express or implied,

which sought to prevent him from dealing in the goods of any competitor of the defendant." (*Nelson Radio & Supply Co. v. Motorola* (5 Cir. 1952) 200 F.2d 911, 915-916, certiorari denied (1953) 345 U.S. 925.)

The contractual relationship between the parties in that case was practically identical to that existing in the instant case. Although the fixed term had expired, the contract there provided that if the parties continued their business relations the contract would govern subject to immediate termination by either party.

Moreover, nowhere in the complaint are there any facts alleged which indicate that the effect of respondent's termination of the contract lessened competition or tended to create a monopoly. Respondent's conduct in terminating the exclusive distributorship franchise is not, as petitioner states, an evasion of the antitrust laws by subterfuge (Petition, p. 5). On the contrary, it followed a common and legitimate business practice necessitated by the economics of the situation which confronted respondent. Respondent's vice president was justly concerned with the decline in petitioner's sales of Eureka cleaners which coincided with petitioner's undertaking to sell Hoover cleaners (R. 22). Since respondent, as long as the exclusive agreement with petitioner continued, could not sell its product to any other distributor in the territory, its only alternative was to exercise its right to terminate. Only thus could it effectively compete.

As the trial court said in dismissing the amended complaint (R. 26):

> "• • • Plaintiff's amended complaint and the exhibits attached thereto clearly indicate that the purpose and effect of defendant's abrogation of the exclusive dealership franchise was to assure increased competition by substituting for plaintiff a distributor who would more actively sell defendant's lines."

In *Camfield Mfg. Co. v. McGraw Electric Co.* (D.Del. 1947) 70 F.Supp. 477, the court dismissed a complaint charging that defendant violated the antitrust laws in refusing to sell its "Toastmaster" electric toaster to distributors who also sold plaintiff's toaster. The court said (p. 481):

> "In general, it seems a necessary part of our business mores for a manufacturer to have free selection in dealing with its distributors. Upon the recognition of this fact, why may he not refuse to do business with one who deals in a closely competitive product? Looking at the reality of our economy, I have never seen a distributor of Ford automobiles, for example, also distribute a car of another competitor within the same price range, such as the Chevrolet; nor does McKesson & Robbins distribute the drug supplies of Park-Davis; etc."

Finally, the facts alleged in petitioner's amended complaint fail to show any injury to the public. It is fundamental that the prohibitions of the antitrust laws were enacted to prevent not the mere injury to an individual which would arise from doing the proscribed acts, but the harm to the general public which would be occasioned by the evils which those laws sought to prevent.

> *Wilder Mfg. Co. v. Corn Products Co.* (1915) 236 U.S. 165, 174.

As the court stated in *Brosious v. Pepsi-Cola Co.* (3 Cir. 1946) 155 F.2d 99 (p. 104):

> "Taken as a whole the action appears to be based upon a private controversy rather than upon one affecting the public as such, a necessary element of the laws which are herein attempted to be invoked."

In accord are:

Hudson Sales Corp. v. Waldrip (5 Cir. 1954) 211 F.2d 268, 274, certiorari denied Oct. 14, 1954, 15 U.S. Supreme Court Bull. 12;

Feddersen Motors v. Ward (10 Cir. 1950) 180 F. 2d 519;

Shotkin v. General Electric Co. (10 Cir. 1948) 171 F.2d 236;

Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir. 1934) 72 F.2d 885, 889;

Abouaf v. J. D. & A. B. Spreckels Co. (N.D.Cal. 1939) 26 F.Supp. 830, 832-833.

II

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OTHER DECISION.

Petitioner relies exclusively upon *United States v. Richfield Oil Corp.* (S.D.Cal. 1951) 99 F.Supp. 280, which this Court affirmed in a memorandum opinion in *Richfield Oil Corp. v. United States* (1952) 343 U.S. 922. In that case, however, the government alleged and the trial court found that the contracts there involved in fact were made upon the condition that the Richfield dealers would not sell competing products. Petitioner has made no such allega-

tion in either of the complaints dismissed below. In addition, the *Richfield* case did not involve a contract under which a distributor had an exclusive franchise for a large area, so that a failure on his part actively to merchandise the manufacturer's product effectively limited—if it did not eliminate—competition.

The instant case is a private controversy between a manufacturer and a wholesaler who lost his exclusive distributorship franchise. It presents no novel or important question of law. There is no conflict of decisions. On the contrary, the decision of the court below is in accord with all pertinent authorities.

CONCLUSION.

For each of the reasons above stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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